In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-151

JULIO FUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5144

LUIS LARA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-5162

FELIX ALEMAN AND PEDRO MANUEL NORIEGA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial in the United States District Court for the Southern District of Florida, petitioners

were convicted on various counts of having violated 18 U.S.C. 2312, 2313, and 371 in connection with a large auto-theft ring.[1] Petitioner Fuentes (No. 73–151) was convicted on two substantive counts, but acquitted on the conspiracy count; he was sentenced on one count to six months' imprisonment and on the other to three years' probation. Petitioner Lara (No. 73–5144) was found guilty on the conspiracy charge and acquitted on four substantive counts; he was sentenced to three years' imprisonment. Petitioners Aleman and Noriega (No. 73–5162) were each convicted of conspiracy and on six and four substantive counts, respectively; petitioner Aleman was sentenced to serve concurrent terms of eighteen months in prison, and petitioner Noriega received concurrent two-year sentences.

All petitioners contend that their indictment was invalid because the sole witness who appeared before the grand jury was an FBI agent whose testimony in substantial part summarized his interviews with informant-witnesses. In addition, petitioners Fuentes (No. 73–151) and Lara (No. 73–5144) argue that the evidence before the grand jury was in any event insufficient to support the indictment; the petitioners Aleman and Noriega (No. 73–5162) argue that the government destroyed "Jencks Act" material prior to trial so as to require dismissal under 18 U.S.C. 3500.

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[1] Forty defendants were originally charged in one conspiracy count and thirty-nine substantive counts. Charges against seven defendants were dismissed. Sixteen pleaded guilty, two were acquitted in separate trials, and one was a fugitive. Petitioners were tried jointly with ten others, eight of whom were acquitted.

The judgment of the court of appeals was entered on May 4, 1973, and petitions for rehearing were denied on June 21, 1973 (Fuentes Pet. App. 13–14). The petition in No. 73–5162 (Aleman and Noriega) was not filed until July 23, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court. Petitioner Lara is now a fugitive, having failed to report as ordered to commence service of his sentence (see App., *infra,* pp. 9–11). In these circumstances, this Court ordinarily will decline to grant relief. *Molinaro* v. *New Jersey,* 396 U.S. 365. In any event, all contentions of all petitioners are without merit.

The evidence at trial disclosed the operation of a large ring of car thieves who stole automobiles in Florida, New York, and New Jersey and transported them among those states and to Puerto Rico. Members of the ring customarily placed on the stolen vehicles identification plates taken from wrecked, similar automobiles which were then destroyed to prevent detection of the switched identification plates. They also repainted or otherwise disguised the stolen automobiles, which they then sold to innocent purchasers or retained for their own use.

1. All petitioners contend that they were brought to trial upon a constitutionally invalid indictment, since the sole witness presented to the grand jury was an FBI agent, Samuel McPheters, whose testimony summarized information he and other investigators had received, primarily from a number of informants who subsequently testified at petitioners' trial. Petitioners contend that the decision below, sustaining the indictment, is contrary to what they

perceive to be the "implicit holding" of *Costello* v. *United States*, 350 U.S. 359 (Fuentes Pet. 7; see Lara Pet. 5–6; Aleman and Noriega Pet. 9).

On the contrary, however, petitioners' assertion that a valid indictment may not be based upon hearsay evidence is fully answered in *Costello* v. *United States*, *supra*. In that case the grand jury heard testimony only from government investigators, who summarized evidence received from other sources without themselves having first-hand knowledge of the facts. The sources of the information were available to testify and were in fact called as witnesses at trial. *Id.* at 360–361. After pointing out that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act" (*id.* at 362), this Court held:

> An indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Id. at 363. Accordingly, "[n]either justice nor the concept of a fair trial" requires the Court to establish a rule permitting challenges to indictments based upon the sufficiency or competency of the evidence presented to the grand jury. *Id.* at 364. See also *Lawn* v. *United States*, 355 U.S. 339, 349–350. The rationale for this rule is obvious, since the grand jury is merely an accusatory stage of the proceeding, and petitioners' rights were protected by the full safe-

guards of the trial. Cf. *United States* v. *Blue*, 384 U.S. 251, 255 n. 3.[2]

2. All petitioners also contend, in substance, that the decision of the court below conflicts with certain Second Circuit rulings which, in the exercise of the court's supervisory power, have restricted the proper use of hearsay evidence to support an indictment. See *United States* v. *Estepa*, 471 F. 2d 1132, 1137 (C.A. 2). However, this case does not present a suitable occasion to review the Second Circuit's response to certain prosecutorial practices in particular types of cases arising within its jurisdiction, because the requisite conditions for application of the Second Circuit rule are not present here and there is no conflict between the result below and any decision of the Second Circuit. Thus, in *Estepa*, the Second Circuit ruled that an indictment may not be returned upon hearsay where direct evidence is available, if the grand jury is misled to believe the witness is testifying from his own knowledge, or if it is unlikely that an indictment would have been returned upon the presentation of eye-witness testimony. In the instant case the opinion of the court of appeals (Fuentes Pet. App. 4 n. 4) and the ruling of the district court (Lara Pet. App.; Tr. 2514–2515) establish that Agent McPheters advised the

[2] These precedents also dispose of the contentions of petitioners Fuentes and Lara that, apart from its hearsay nature, the weight of the evidence before the grand jury was insufficient to support their indictment.

grand jury that his information came from interviews with others, rather than from direct observation, and that the grand jury fully understood that the testimony was hearsay.[3] Nor has there been any showing that his testimony contained factual errors or that the grand jury otherwise might not have indicted these petitioners upon the informers' testimony.[4]

3. Petitioners Aleman and Noriega (No. 73–5162) contend that the government, prior to trial, destroyed written records of various statements made to FBI agents by government witnesses, thereby allegedly violating the Jencks Act, 18 U.S.C. 3500. This assertion is based on the fact that the FBI agents who interviewed government witnesses routinely destroyed their original notes after making up "302" reports of the interviews. The "302's" pertaining to petitioners were voluntarily turned over to defense counsel (Aleman and Noriega Pet. App. 7 n. 9). At trial, petitioners claimed that the original notes had contained substantially verbatim recitals by the witnesses, which were not reproduced in the "302's." After a lengthy

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[3] Petitioner Lara also asserts that the trial judge questioned the sufficiency of the evidence before the grand jury to establish probable cause. The record discloses, however, that the court's concern was for other defendants not tried with petitioners (Lara Pet. App.; Tr. 2760–2766).

[4] All petitioners have in effect claimed that the Second Circuit rule is required as a matter of constitutional law under the Fifth Amendment, but even the Second Circuit has recognized that its restrictions on the use of hearsay to support an indictment are not constitutionally compelled, in light of *United States* v. *Costello*, *supra*, and are based only upon the court's exercise of its supervisory power. See *United States* v. *Estepa*, *supra*.

evidentiary hearing, the trial court concluded as a factual matter that the notes had not contained substantially verbatim transcriptions of the witnesses' words, although some phrases may have been quoted directly (Tr. 1406–1407).[5] As the court of appeals noted, this finding on disputed facts must stand unless clearly erroneous, and the court below found no error at all (Aleman and Noriega Pet. App. 8–9). Petitioners make no showing of error or prejudice to warrant further review of this concurrent factual finding of two courts. *United States* v. *Augenblick*, 393 U.S. 348, 354–355; see *United States* v. *Blackburn, supra; United States* v. *Lepiscopo*, 429 F. 2d 258, 260 (C.A. 5), certiorari denied, 400 U.S. 948.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

[5] On the basis of this finding, it is clear that the original notes would have not been subject to production under the Jencks Act, even if they had remained in existence at the time of trial. *United States* v. *Blackburn*, 446 F. 2d 1089 (C.A. 5), certiorari denied, 404 U.S. 1017.